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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JOE THOMAS CHAVEZ et al., Defendants and Appellants.	B280080 (c/w B281289) (Los Angeles County Super. Ct. No. NA094003)

APPEAL from judgments of the Superior Court of Los Angeles County. Gary J. Ferrari, Judge. Affirmed in part, reversed in part, remanded in part, and modified in part.

Linda L. Gordon, under appointment by the Court of Appeal, for Defendant and Appellant Joe Thomas Chavez.

Mary Jo Strnad, under appointment by the Court of Appeal, for Defendant and Appellant Miguel Garcia.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Zee Rodriguez and Corey J. Robins, Deputy Attorneys General, for Plaintiff and Respondent.

In an 11-count information, the Los Angeles County District Attorney's Office charged defendants and appellants Joe Thomas Chavez (Chavez) and Miguel Garcia (Garcia) with the attempted premeditated murder of Glen Gosnell (Gosnell) (Pen. Code, §§ 664/187, subd. (a); count 1)[1] and first degree burglary where a person was present (§ 459; count 2). As to both counts, it was further alleged that defendants personally inflicted great bodily injury, making the offenses serious felonies (§§ 12022.7, subd. (a), 1192.7, subd. (c)(8)) and that a principal personally used a firearm (§ 12022.53, subds. (b) & (e)(1)). The information also alleged that Garcia personally used a firearm, making the offenses both serious and violent felonies (§§ 12022.53, subd. (b), 1192.7, subd. (c)(8), 667.5, subd. (c)(8)).

Counts 3 through 5 charged defendants with offenses against Balam Diaz (Diaz). Count 3 alleged second degree robbery (§ 667.5, subd. (c)(8)), that defendants personally used a firearm (§ 12022.53, subd. (b)), and that the offense was a serious felony (§§ 667.5, subd. (c), 1192.7, subd. (c)). Count 4 alleged making a criminal threat (§ 422, subd. (a)), a serious felony (§ 1192.7, subd. (c)). Count 5 alleged false imprisonment by violence, menace, fraud, or deceit (§ 236) and that defendants personally used a firearm (§ 12022.53, subd. (b)).

Counts 6 through 10 charged Garcia only. Count 6 alleged extortion of Diaz (§ 520). Count 7 alleged first degree burglary with a person present (§ 459), a violent felony (§ 667.5, subd. (c)), and an offense that disqualified Garcia from a grant of probation (§ 462, subd. (a)). Count 8 charged him with making a criminal threat against Elizabeth Ponce, a serious felony (§§ 422, 1192.7,

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

subd. (c)) and personal use of a firearm (§ 12022.53, subd. (b)). Count 9 alleged possession of a firearm by a felon (§ 29800, subd. (a)(1)). And, count 10 alleged felony evading a police officer (Veh. Code, § 2800.2, subd. (a)).

Count 11 charged Chavez only with unlawfully carrying a loaded firearm by an active participant in a street gang. (§ 25850, subds. (a) & (c)(3).)

As to all counts, the information alleged that each offense was committed for the benefit of, at the direction of, and in association with a criminal street gang with the specific intent to promote, further, and assist in criminal conduct by gang members, thereby making each offense a serious felony. (§§ 186.22, subd. (b)(1)(C), 1192.7, subd. (c)(28).) Furthermore, as to all counts, the information alleged that Garcia had suffered three prior convictions for which he served a prison term within the meaning of section 667.5.

On April 28, 2016, the trial court dismissed count 8 and the accompanying firearm, gang, and prior prison allegations. After the close of evidence, the trial court dismissed count 4 as to Chavez.

Following trial, the jury acquitted defendants of counts 1 and 2. Garcia was convicted of robbery (count 3), criminal threats (count 4), false imprisonment by violence (count 5), attempted extortion (count 6), possession of a firearm by a felon (count 9), and evading an officer (count 10). Gang enhancements were found to be true on all Garcia conviction counts. Chavez was convicted of second degree robbery (count 3), false imprisonment by violence (count 5), and carrying a loaded firearm while an active participant in a street gang (count 11). Gang enhancement allegations were found true on each count. Firearm enhancement allegations were found true on counts 3 and 5.

Garcia was sentenced to state prison for 16 years on count 3, two years pursuant to section 667.5, subdivision (b), plus two years four months on count 4, one year eight months on count 9, and one year eight months on count 10, for a total of 23 years eight months. Other terms were imposed and stayed pursuant to section 654. Chavez was sentenced to state prison for a total term of 25 years on count 3, and two concurrent terms on counts 5 (14 years four months) and 11 (16 months). Chavez was ordered to pay a $40 court operations assessment on each count (§ 1465.8, subd. (a)(1)), a $30 criminal conviction assessment on each count (Gov. Code, § 70373), and a restitution fine of $7,500 (§ 1202.4, subd. (b)).

Defendants timely appeal.

BACKGROUND

The People's Evidence

A. The attempted murder of Gosnell and burglary of his home (counts 1 & 2)

In November 2012, Gosnell lived in Long Beach with Robert Sanchez (Sanchez). Gosnell's sister, Nancy Gosnell (Nancy), lived in another home on the property. Gosnell was the "shot caller" for the Eastside Longo gang. His responsibilities included collecting "taxes," or payments, for the Mexican Mafia. Gosnell had known defendants, who were active Eastside Longo gang members for around 10 years. He typically saw them together, and Garcia had "clout" over Chavez.

At that time, Sanchez had allowed "Allstar," another member of the Eastside Longo gang, to sleep at his home.

In late October 2012, Garcia received authority to take over Gosnell's tax-collecting responsibilities. Gosnell declined Garcia's request to work with him, but agreed to introduce Garcia to some drug dealers. Within several days, Gosnell met with defendants and several others at a local bar, Cristela's. After the meeting at

Cristela's, a day or two before November 7, 2012, Garcia arrived at Gosnell's house while Allstar was there. Gosnell introduced Garcia and Allstar.

On another occasion before November 7, 2012, Garcia called Gosnell while Gosnell was driving with "Happy," another Eastside Longo gang member. Garcia accused Gosnell and Happy of stealing tax money and threatened Gosnell. Gosnell told Garcia to "bring it."

On the evening of November 7, 2012, Gosnell slept in his den, while Sanchez slept in his own bedroom. During the morning hours of November 8, 2012, Gosnell was awakened by a knock on the door; he then heard someone identify himself as Allstar. Gosnell unlocked the door, turned, and walked back to his den. As Gosnell crossed its threshold, he was struck from behind on his head. Gosnell stumbled, and then turned and saw Garcia pointing a handgun at him. Garcia repeatedly asked, "'You know who I am? You know who I am?'"

Meanwhile, Sanchez was awakened by someone who had pulled Sanchez by his clothing and then placed a towel over his head. Sanchez was told to lay down; the assailant threatened to hurt Sanchez if he moved because "'something bad [was] going to happen.'" Sanchez complied. Gosnell heard Chavez's voice emanating from Sanchez's room.

Another person entered the den. He was armed with a rifle and repeatedly struck Gosnell with it. Gosnell lost consciousness. Sanchez could hear Gosnell screaming in the den as if being beaten. Sanchez fell asleep. When he awoke, he saw that the den had been ransacked and that there was blood on the floor. Sanchez closed the den door and then enlisted Nancy's aid. In the den, Nancy and Sanchez found Gosnell lying on the floor, covered in blood and his head unrecognizable. Sanchez called the police.

Gosnell was admitted to the hospital, where he remained for about a month, undergoing multiple surgeries for significant head injuries and a broken jaw.

On November 21, 2012, Long Beach Police Detective Robert Gonzales showed Gosnell photographs in an effort to identify his attackers. Gosnell identified Garcia, who he knew as "Toro," as the person who assaulted him. He also identified Chavez as "Tubbs" as being involved.

B. The robbery, criminal threats, false imprisonment, and attempted extortion of Diaz

In October and November 2012, Diaz lived in an area of the city purportedly claimed by the Westside Longo gang. Diaz, an associate of the Eastside Longo gang, knew defendants as active members of that gang. Diaz and Garcia engaged in a drug dealing business together. Prior to October 2012, Diaz and Garcia did not have any problems in their relationship, and Garcia protected Diaz.

1. Diaz is accused of being a police informant

One day in October 2012, Diaz, "Perico" (a member of the Westside Longo gang), and Garcia were riding together in Diaz's car, with Garcia driving. Garcia held a gun in his hand while he drove. "Chava," who was from the Eastside Longo gang, called on Diaz's cell phone while the three men were driving. Diaz answered the phone on speaker and said that Garcia and Perico were with him. Chava warned Garcia and Perico that Diaz was working with the police.

Garcia took the phone off speaker, spoke with Chava, and then became very serious. Garcia's attitude towards Diaz changed. He refused to answer Diaz's questions, saying that they would talk at Chavez's house. Diaz became afraid because he "kn[e]w [Garcia]. [Diaz had seen] several things and [Garcia] [did not] play around."

At Chavez's house, the group went into the garage. Defendants pointed guns at Diaz, disarmed him of his own firearm, and made him remove his clothes. Chavez was standing around five feet from Diaz. While Chavez pointed his gun (an AK) at Diaz, Garcia took Diaz's cell phone, rings (including his wedding ring), wallet, and Samsung Tablet, and placed those items in his bag. After determining that Diaz was not wearing microphones, defendants permitted him to get dressed.

Perico and Garcia drove away in Diaz's car, leaving Chavez and Diaz in Chavez's garage. Chavez, still holding his AK trained on Diaz, told Diaz to remain calm. Garcia returned after around an hour. The men put Diaz in the back seat of his car, with Chavez and Perico bookending him, Chavez still armed with his AK firearm that he continued to point at Diaz. Perico had Garcia's firearm. Diaz feared that the men would kill him.

The men drove Diaz to a mechanic's shop. When Diaz asked what was going to happen, Garcia said that they would see. Garcia and Perico got out of the car, leaving Diaz with Chavez. At some point, Garcia said that he did not know whether to let Diaz go; he asked Diaz what he would do if Garcia released him. Diaz said that he would remain quiet. Garcia gave Diaz back his car keys, wallet, and cell phone, but kept his jewelry. Defendants and Perico left with "La Guerrera," who came and picked them up. Diaz drove home where, afraid and crying, he told his wife what had happened.

2. Defendants attempt to extort $15,000 from Diaz and take his Ford Expedition

The following day, Garcia, his wife, and Perico confronted Diaz outside of his house and accused him of sexually abusing "Ruby," a waitress at Cristela's and Chava's friend. In fact, Diaz was friends with Ruby; they had had sexual relations on one occasion. Garcia demanded $15,000 from Diaz, giving him two

weeks to pay. Diaz was afraid to seek police assistance because Garcia controlled the Eastside Longo gang.

Two days later, Garcia asked Diaz about the money, and Garcia said that if he received orders to kill Diaz, he had to comply. Diaz believed Garcia would kill him if he was told to do so because Garcia did not "play around." Garcia, armed with his gun, told Diaz he had seven days in which to pay or die. Diaz was afraid. Then, within a few days of the second meeting, Chavez told Diaz that his baby had just been born and he needed to use Diaz's wife's Ford Expedition to drive his own wife and child home from the hospital. Diaz gave Chavez permission to use the Expedition, which Chavez said he would return shortly. Defendants left together in the Expedition; later, Garcia called Diaz and said that the vehicle would be considered a $5,000 payment on Diaz's debt to defendants. Diaz's wife reported the Expedition as stolen.

Because Diaz lived in an area purportedly claimed by the Westside Longo gang, he turned to that gang for help. On or around November 13, 2012, defendants and Perico went to Diaz's house for a meeting with three members of the Westside Longo gang. Garcia said that he wanted Diaz to accompany them and that he wanted to check Diaz's cell phone. Diaz refused because he believed that the men would kill him. Garcia grabbed Diaz's cell phone. Perico and Garcia assaulted Diaz while Chavez watched. Garcia got ahold of Diaz's cell phone. He and Perico restrained Diaz by holding his arms. Diaz's wife recovered the cell phone and chased the gangsters from the Diaz home. Perico and defendants left in Diaz's Expedition.

Around three hours later, Garcia and Perico returned to Diaz's home in the Expedition. Diaz thought that they knew he was home because his car was parked outside. They knocked on his door. Diaz and his wife did not answer. Garcia, holding a

gun, yelled for Diaz while checking for an unsecured door or window. Diaz remotely activated the alarm on his car. Garcia and Perico ran away. Defendants and Perico subsequently drove by Diaz's house several times. Diaz contacted the police.

C. Defendants' arrests

On the evening of November 14, 2012, Long Beach Police Officers Ricardo Solorio and Carlos Del Real heard a radio call describing Diaz's Expedition's current location and were told that it was wanted for a felony violation. The officers observed the Expedition at a red light and tried to effect a vehicle stop. The Expedition fled at a high speed, eventually reaching a residential area, where it slowed to a "roll." While the Expedition was still moving, Garcia (the driver) got out of the vehicle, tumbled, regained his footing, and fled. Officer Solorio chased and caught Garcia while Officer Del Real captured Chavez, the front seat passenger. A rear seat passenger escaped.

After his arrest, Chavez admitted that he was Tubbs from the Eastside Longo gang, that he was seated in the front passenger seat, and that he knew the police were behind him. He denied having a firearm in the vehicle. Officers searched the Expedition and recovered three live .44 caliber rounds in the vehicle (two from the driver's side floorboard and one from the rear passenger side floorboard), and a Smith & Wesson .44 caliber revolver that was on the driver's side floorboard by the rear passenger seat, within Garcia's "wing span." A subsequent search yielded a black glove, a loaded semiautomatic .380 caliber handgun hidden behind the door panel of the right front passenger side door, and a box of .380 caliber ammunition that was concealed in an air conditioning vent in the interior cover of the car's roof, near its center.

D. The jailhouse recordings

Long Beach Police Officers Malcolm Evans and Todd Johnson went to the Long Beach City Jail on November 17, 2012. Chavez had been placed in a cell equipped with a recording device with other individuals. Officers Evans and Johnson then engaged in a "stimulation," an investigative tool to encourage conversation.

On November 19, 2012, Chavez was transported to the Los Angeles County Jail along with Garcia and placed in a "recorded environment" with other individuals. Surreptitious recordings were made in the jailhouse of defendants' conversations on November 17, 2012, through November 19, 2012.

1. First recording ("Chavez 4th and JP")

Chavez said that he was in custody for kidnapping, second degree robbery, assault with a deadly weapon, evading police, and participating in a criminal street gang, and they had "like four [guns] in the car." When asked if he was "with it or what," Chavez said, "[a]ctive, my boy," and "[f]ull blast," meaning that he was willing to be the best gang member possible. Chavez stated that when he was arrested for evading the police, he "[g]ot nailed" with "Toro" and "Baby Toro," but the latter had escaped.

When asked if he committed a robbery, Chavez replied: "It was his bitch ass friend, Balam," and that "Toro took his ***" while they were in a garage, in Chavez's presence. Chavez said that Toro had searched the victim, took property, and then the victim gave his truck to Toro. With respect to kidnapping, Chavez said that the victim was "cool one minute, then Toro f***ed that fool up the other day." The victim had been selling drugs but decided to stop, so "Toro snatched that fool up," "[t]ook him to [Chavez's] baby momma's house," and put him in the garage where Chavez had a rifle. The victim also said that he did

not want to "pay up" because he no longer sold drugs. So, they "tried to go f***in' tax this motherf***er." Toro and Chavez were arrested in the truck after a high speed chase.

Chavez explained that the kidnapping charge was because Toro had left the victim in the garage with Chavez, who held him there. However, the victim then wanted to inform on them so Chavez did not care anymore. The rifle was "gone." When asked how the "four" was involved, Chavez said, "I had a burner. Toro had a burner. The other homie had a burner. We all had burners." Chavez explained that he put his "inside the [] door handle," which "popped open." Toro's firearm was "towards the backseat."

2. Second recording ("Garcia JP Transcript")

Garcia said, "That fool [Gosnell] ain't nothing . . . [or] nobody," and that they had taken care of him by "split[ting] him."[2] Garcia explained, "If I find out something, like, I'm going to direct that s*** and make sure that fool gets smashed with, jacking a homie's money, ya' know what I mean?"[3]

Garcia stated that "[a]nything I would do, my boy, is for the cause, my boy." He explained: "I don't want you to think it's for my . . . benefit. *** Why the f*** do I want to have a f***ing truck? I mean all that s***—it went to the homies." Garcia further stated that after taking "him" to the house, "he" held him there with an "SKS" after Garcia told "him" to "take care of his a**." As for Gosnell, Garcia explained that he and two others had "smash[ed] him," but did not "tear [him] up." They did it because Gosnell was stealing money. Garcia acted for "the

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[2] To "split" someone means to open them up, to hurt them, or to beat them.

[3] To "direct that s***" means to take care of something, to ensure that it is accomplished.

cause," not for his own benefit,[4] and would do "anything for the cause." He said, "Me, I would have been G'd up whatever that. I'm still gonna exist, that's cool."

3. Third recording ("IRC JP CD")

Chavez said that he and Garcia were charged with the "same s***." Garcia said that "[t]hey had pictures of niggas laid out nigga over in the hospital."[5] Garcia said that Gosnell was in a coma and on life support, that Garcia hoped he would die, and that he "made sure that fool seen my face." When asked whether Gosnell was struck with a "Blue steel four five," Chavez said, "Hey fool, a SKS." Chavez and Garcia explained that there was an "old man in the house," and that they had tied him with Saran Wrap. They had "f***[ed] . . . up" the person who was in the coma. Chavez said that he put a towel over the old man's head and told him to lay down, and that Chavez did not want to hurt that person. Garcia also said that Allstar, Gosnell's "own boy," had set him up.

E. Gang evidence

Long Beach Police Detective Hector Gutierrez testified as a gang expert. Gang members were known by their monikers and sometimes by additional descriptors. "Soldier[s]" were common, every day gang members, and "shot callers" were above the soldiers. Above the shot callers were older gang members in prison who controlled everything.

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[4] In saying "anything I . . . do . . . is for the cause," the speaker was saying that his actions were intended to benefit the gang, and were not for his own personal benefit. Something being "for the homies" meant that it was to benefit the gang.

[5] This phrase means that they had photographs of the injured victim in the hospital.

Snitching, or cooperating with law enforcement, was forbidden. People who broke gang rules could be beaten, shot, stabbed, or killed. Disrespect and retaliation could occur within a gang, involving members of the same gang.

To induce fear and earn their version of respect, gang members would commit crimes against and threaten others. Gang members made money by committing crimes such as narcotics sales and extortion, as well as by intimidating people. Gangs would also "tax[]" businesses in a geographic area that they purported to control. The commission of crimes by a gang member would benefit the gang by increasing the gang member's level of respect individually and the gang's collectively.

Gang members would sometimes turn on their own. If there was a perceived act of disrespect between two members of the same gang, then the gang's leadership would have to intercede and possibly kill, beat, or discipline someone.

Territory is important to a gang, and the Eastside Longos were territorial. They would use violence to defend their territory.

Detective Gutierrez was familiar with the Eastside Longo criminal street gang. In his opinion, the gang's primary activities were murder, robbery, criminal threats, assault with a deadly weapon, and the sale of narcotics. In his opinion, members of the Eastside Longo gang individually or collectively engaged in a pattern of criminal gang activity.

Detective Gutierrez heard about Diaz in around November 2012. He did not know Diaz to be an active member of the Eastside Longo gang, but he may have been an associate of that gang.

Detective Gutierrez was aware of Gosnell in October and November 2012 and knew Gosnell to be an active member of the Eastside Longo gang. He was also aware of defendants and,

based on their admissions, knew them to be active members of the Eastside Longo gang.

Given a hypothetical based on the facts of the Gosnell incident, Detective Gutierrez opined that the incident was committed for the benefit of the gang and was committed in association with the gang because two or more gang members acted together. The fact that acting gang members admitted their actions eight to 12 days later demonstrated that they wanted to intimidate people as "crazy, violent gang members."

Given a hypothetical based on the facts of the crimes committed against Diaz, Detective Gutierrez opined that those crimes were committed to further and benefit the gang because they enhanced the gang's reputation and resulted in financial gain. Also, because multiple gang members committed the crimes together, they acted in association with a criminal street gang. The fact that they bragged about the crimes afterwards demonstrated a benefit to the gang through elevated reputations.

Given a hypothetical example based on the facts of the vehicle pursuit and arrests, those incidents benefitted, promoted, and furthered the gang because a stolen vehicle could be used to commit crimes with firearms, which would increase the gang's and acting members' reputations.

Defendants' Evidence

Neither defendant testified.

The parties stipulated that a trigger assembly recovered at the Gosnell crime scene was examined and tested, but no DNA or latent fingerprints were recovered.

DISCUSSION

I. Substantial evidence supports Chavez's conviction for robbery (count 3)

Chavez argues that insufficient evidence supports his conviction for robbing Diaz (count 3) because there is insufficient

evidence that he knew of Garcia's intent to commit robbery, that Chavez shared that intent, or that Chavez acted with that knowledge and intent to aid and abet Garcia in robbing Diaz.

A. *Standard of review*

When a convicted defendant seeks relief based on insufficient evidence the appellate court reviews the evidence in the light most favorable to the prosecution and determines whether any rational trier of fact could have found substantial evidence of the essential elements of the crime. (*Jackson v. Virginia* (1979) 443 U.S. 307, 318–319; *People v. Johnson* (1980) 26 Cal.3d 557, 578.) We presume every fact that the jury could reasonably deduce from the evidence in support of the judgment. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) We do not reweigh the evidence, and we will not reverse even if a different verdict could reasonably have been reached. (*People v. Proctor* (1992) 4 Cal.4th 499, 529.) Unless the testimony is physically impossible or inherently improbable, a single witness's testimony is sufficient to support a conviction. (*People v. Young* (2005) 34 Cal.4th 1149, 1181.)

The same standards apply where the jury's findings are based on circumstantial evidence. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1125.) If the circumstances reasonably justify the jury's findings, reversal is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding. (*People v. Albillar* (2010) 51 Cal.4th 47, 60.)

B. *Relevant law*

Robbery is the taking of personal property in another's possession, against that person's will, from the person or the person's immediate presence, by means of force or fear, with the specific intent to permanently deprive the person of property. (§ 211; *People v. Harris* (1994) 9 Cal.4th 407, 415.)

A person may be guilty for directly committing a crime or as an aider and abettor. (*People v. Loza* (2012) 207 Cal.App.4th 332, 348–350.) Aider and abettor liability requires proof that (1) the direct perpetrator committed a crime, (2) the defendant acted with the intent or purpose of committing, encouraging, or facilitating commission of the crime, and (3) the defendant, by act or advice, aided, promoted, encouraged, or instigated commission of the crime. (*People v. Perez* (2005) 35 Cal.4th 1219, 1225.) To aid and abet a specific intent crime, a person must "'share the specific intent of the perpetrator,'" meaning that he "'knows the full extent of the perpetrator's criminal purpose and gives aid or encouragement with the intent or purpose of facilitating the perpetrator's commission of the crime.'" (*People v. McCoy* (2001) 25 Cal.4th 1111, 1118.)

Presence at the scene, companionship with the perpetrator, and conduct before and after the crime are relevant factors in determining aider and abettor liability. (*People v. Nguyen* (2015) 61 Cal.4th 1015, 1054.) Gang evidence is also relevant to prove aiding and abetting. (*People v. Burnell* (2005) 132 Cal.App.4th 938, 947.)

For purposes of aider and abettor liability, a robbery continues until the robbers, still in possession of the stolen property, reach a place of temporary safety. (*People v. Harris* (1994) 9 Cal.4th 407, 421.) Thus, a person aids and abets a robbery if he forms the necessary intent prior to or during the carrying away of the stolen property, provided a place of temporary safety has not been reached. (*People v. Pulido* (1997) 15 Cal.4th 713, 723.) Whether a place of temporary safety has been reached is determined by an objective standard and is not based on the state of mind of the perpetrators. (*People v. Johnson* (1992) 5 Cal.App.4th 552, 560.)

C. *Analysis*

Applying these legal principles, we conclude that ample evidence supports Chavez's conviction for aiding and abetting the robbery of Diaz. Chavez aided and abetted the robbery by holding Diaz at gunpoint in Chavez's garage while Garcia made Diaz remove his clothing and hand over all of his personal property, including his jewelry. Chavez held his gun trained on Diaz from five feet away while Garcia took Diaz's belongings. While the apparent initial motive for defendants' confrontation of Diaz was suspicion that he was a police informant, the taking of all of his personal property, including jewelry, could not reasonably have implicated that concern.

Moreover, the robbery continued until at least to the point that Diaz was permitted to leave from the mechanic's shop and defendants left with La Guerrera, a confederate who picked them up, because until that time, defendants were in danger of being arrested for transporting and holding their victim at gunpoint while Garcia also possessed Diaz's stolen jewelry. Throughout that time, Chavez held Diaz at gunpoint while waiting for Garcia to decide whether to release or kill Diaz. Diaz was under Chavez's continuing control when Garcia gave Diaz back his property except his jewelry.

In addition, the gang evidence presented at trial further supports the jury's verdict on count 3. (*People v. Burnell*, *supra*, 132 Cal.App.4th at p. 947.) Although the jury acquitted defendants of attempting to murder Gosnell, Gosnell testified that Garcia had "clout" over Chavez, meaning that Chavez followed Garcia's orders. And, Gosnell testified that he generally saw defendants together in the 10 years that he knew them. Moreover, Detective Gutierrez testified that one of the Eastside Longo gang's primary activities included robbery. As a longstanding member of the Eastside Longo gang under direct

control of one of its leaders, Chavez had a heightened knowledge and awareness of Garcia's intent and actions, and he had a duty to aid and abet when Garcia initially took Diaz's property and then returned everything except Diaz's jewelry.

Finally, given defendants' gang membership and longstanding friendship, Chavez's actions before, during, and after the Diaz robbery support his conviction. From the moment Garcia brought Diaz to Chavez's home, Chavez willingly held Diaz at gunpoint from five feet away while Garcia took Diaz's property, transported Diaz to another location while Garcia contemplated Diaz's fate, and then kept Diaz's jewelry. In the incidents after the robbery, Chavez assisted Garcia in attempting to extort Diaz and in the taking and keeping of Diaz's Ford Expedition. (*People v. Nguyen*, *supra*, 61 Cal.4th at p. 1054 [companionship with the perpetrator and conduct before and after the crime are relevant factors in determining aider and abettor liability].)

Given the totality of the evidence, Chavez's conviction for robbery is amply supported by the evidence presented at trial.

II. The trial court properly admitted defendants' surreptitiously recorded jailhouse statements

Chavez argues that the trial court erroneously admitted his recorded jailhouse statements because they were obtained through deception and manipulation, and their admission violated his rights to due process and counsel. He claims that detectives initially arrested him for charges relating to his arrest (counts 9 & 11). Then, rather than arraigning him on those charges within the time frame set forth in section 825, thus implicating his right to counsel, detectives released and rearrested him for the attempted murder of Gosnell. Garcia raises the same claim.

A. *Relevant trial court proceedings*

1. Facts relating to defendants' arrests

Detective Gonzales was assigned to the Gosnell investigation on November 8, 2012. He learned of the events involving Diaz on November 14, 2012, from Diaz, who reported the theft of his Expedition. Detective Gonzales then became the lead investigator for both the Gosnell and Diaz crimes. The pursuit and arrest of defendants occurred on November 14, 2012, after Detective Gonzales spoke with Diaz.

Defendants were arrested on their arrest-related crimes (counts 9 through 11) on November 14, 2012. They were "released" on those charges and then immediately rearrested on November 16, 2012, on charges related to the Gosnell incident. Surreptitious recordings were made in the jailhouse of defendants' conversations on November 17, 2012, through November 19, 2012. On November 21, 2012, Gosnell, while hospitalized, identified defendants as his attackers.

2. People's motion to admit defendants' statements

The People filed a motion to admit defendants' surreptitiously recorded jailhouse statements. The People argued that the statements were admissible because defendants had not been formally charged and brought before the court.

Chavez's defense attorney stated: "If we're talking about whether or not *Perkins*[6] operation recordings are admissible, I wish it weren't so but I think it is." He then stated, "I object and submit."

Garcia's counsel stated that he objected because the undercover officers engaged in active questioning. The prosecutor responded that the issue was whether defendants perceived that they were speaking with police officers or their agents, or whether they thought they were speaking with other

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6 *Illinois v. Perkins* (1990) 496 U.S. 292.

inmates. Since defendants thought they were speaking with other inmates, they were not subjected to any form of custodial interrogation. Thus, their recorded statements were admissible.

Trial counsel for Chavez then stated that defendants were initially arrested on Wednesday, November 14, 2012, after 5:00 p.m. Therefore, they were required to be brought to court no later than Monday, November 19, 2012. The third jailhouse recording was made on November 19, 2012, in custody in downtown Los Angeles. Since they were legally required to have been brought to court by November 19, 2012, anything that occurred after they did not come to court on that date was inadmissible because defendants' right to a speedy arraignment was violated.

The prosecutor responded as follows: Defendants were initially arrested on Wednesday, November 14, for evading officers in a high speed police chase, which led to three of the charges filed in this case (counts 9 through 11). On Friday, November 16, Detective Gonzales released defendants on the initial charges related to the chase and then rebooked them immediately on the charges related to Gosnell (counts 1 & 2). Thus, the time governing when defendants were required to be brought to court on formal charges was restarted on Friday, November 16.

Trial counsel for Chavez agreed that if there had been a rebooking, then he would be "more convinced in the accuracy" of the prosecutor's contentions, but absent documentary evidence, he stood on his objection. Counsel for each defendant agreed that it was not necessary for the prosecutor to call detectives to testify to the circumstances of the recording operations, and they agreed to stipulate to foundation for the recordings. Chavez's trial counsel specifically stated that he had no objection to the methodology used in the recording operation.

The trial court credited the prosecutor's offer of proof that defendants were rebooked on Friday, November 16, 2012, and overruled defendants' objections.

B. *Section 825 does not apply*

Defendants base their argument on section 825.[7] But section 825 applies only to persons arrested pursuant to warrant. (*People v. Hughes* (2002) 27 Cal.4th 287, 326 ["The two-day limitation of section 825 does not apply to this case, in which arrest was made without a warrant," citing section 849]; *People v. Bonillas* (1989) 48 Cal.3d 757, 787, fn. 11 ["Section 849 is to be contrasted with section 825 . . . . The two-day limitation is not contained in section 849"].) Persons arrested without a warrant have the right to be arraigned only "without unnecessary delay." (§ 849, subd. (a).)

Here there is no evidence that defendants were arrested pursuant to warrant. When detectives pursued and arrested defendants, they had been told that a vehicle wanted in a felony investigation had been located. Moreover, Detective Gonzales had just learned on the day of defendants' arrest about the crimes against Diaz, and Gosnell did not identify defendants' photographs until November 21, 2012. Thus, when Diaz's vehicle that had been reported stolen was observed and recovered by the police and its occupants (defendants) arrested, the Diaz and Gosnell incident investigations were continuing. Based on this evidence, it seems that defendants were not arrested pursuant to warrant on November 14, 2012. It follows that defendants' argument pursuant to section 825 fails.

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[7] Section 825, subdivision (a), provides, in relevant part, that "the defendant shall in all cases be taken before the magistrate without unnecessary delay, and, in any event, within 48 hours after his or her arrest, excluding Sundays and holidays."

And, although defendants do not raise section 849 here, we conclude that it was not unreasonable for defendants not to have been arraigned until November 19, 2012. (§ 849, subd. (a).) In addition to the circumstances of defendants' arrests, the police were investigating serious crimes flowing from two separate incidents involving different victims. (*People v. Bonillas*, *supra*, 48 Cal.3d at p. 787.)

C. *The trial court properly exercised its discretion in admitting defendants' jailhouse admissions*

Regardless of whether the two-day limitation applies, the trial court properly exercised its discretion in admitting defendants' jailhouse statements.

Under *Massiah v. United States* (1964) 377 U.S. 201, once an adversarial criminal proceeding has been initiated against a defendant, the Sixth Amendment right to counsel attaches and, from that time on, any incriminating statement that the government deliberately elicits from the accused in the absence of counsel is inadmissible at trial against that defendant. (*Id.* at pp. 205–207.) That said, the Sixth Amendment right to counsel is offense-specific. (*Texas v. Cobb* (2001) 532 U.S. 162, 167–168.) "Thus, '[e]ven after an accused has counsel with regard to a particular charged offense, he or she may be questioned by police following . . . advisements with respect to any uncharged offense. [Citation.] Incriminating statements pertaining to those uncharged offenses, as to which the Sixth Amendment right has not yet attached, are admissible at a subsequent trial of those offenses. [Citations.]' [Citation.]" (*People v. Slayton* (2001) 26 Cal.4th 1076, 1079; see also *Maine v. Moulton* (1985) 474 U.S. 159, 180, fn. 16 ["Incriminating statements pertaining to other crimes, as to which the Sixth Amendment right has not yet attached, are, of course, admissible at a trial of those offenses"].)

Here, defendants' Fifth and Sixth Amendment rights were not violated. As to the Gosnell charges, the jailhouse recordings occurred within the time frame allowed by section 825 (and necessarily within the time frame permitted by section 849). Defendants were arrested on those charges on Friday, November 16, 2012. Forty-eight hours, excluding Sunday, provided for the earliest deadline of Monday, November 19, 2012. (§ 825, subd. (a).) The recordings were made between November 17 and 19, 2012. Since the police were within the statutory time constraint as to the Gosnell charges when the recordings were made, defendants' argument fails as to the Gosnell charges.

The appellate record is unclear as to when defendants were arrested on the charges relating to their crimes against Diaz. But it is clear that as of November 19, 2012, defendants had only been arrested on the evading police, firearm possession, and Gosnell charges. Thus, the Diaz charges are not implicated by defendants' instant claim.

In urging reversal, defendants argue that the police were required to arrest them on all of the charges that were ultimately filed (the evading incident, the Gosnell incident, and the crimes against Diaz) as of Wednesday, November 14, 2012. The United States Supreme Court has held otherwise. (See *Hoffa v. United States* (1966) 385 U.S. 293, 310 ["There is no constitutional right to be arrested. The police are not required to guess at their peril the precise moment at which they have probable cause to arrest a suspect, risking a violation of the Fourth Amendment if they act too soon, and a violation of the Sixth Amendment if they wait too long. Law enforcement officers are under no constitutional duty to call a halt to a criminal investigation the moment they have the minimum evidence to establish probable cause, a quantum of evidence which may fall far short of the amount necessary to

support a criminal conviction"]; *People v. Webb* (1993) 6 Cal.4th 494, 527–528.)

D. *Any error was harmless*

Even if the trial court had erred by admitting defendants' jailhouse statements, which it did not, that error would have been harmless. (*People v. Watson* (1956) 46 Cal.2d 818, 836; *Chapman v. California* (1967) 386 U.S. 18, 26.)

Defendants were acquitted on counts 1 and 2, despite Garcia's inflammatory statements to his purported cellmate that he and Chavez had "split" Gosnell, that defendants "smash[ed]" Gosnell, and that he hoped Gosnell would die.

As for the counts on which defendants were convicted, defendants suffered no prejudice as a result of the admission of the jailhouse recordings. On counts 9, 10, and 11, defendants were caught in possession of firearms after trying to evade the police in a high speed chase. The strength of that evidence rendered superfluous any recorded statements. As for the counts relating to the crimes against Diaz, the evidence was overwhelming. Not only was Diaz's testimony compelling, but defendants were arrested driving the Expedition that they stole from Diaz.

It follows that any alleged error in admitting defendants' jailhouse statements into evidence was harmless as a matter of law.

III. Chavez's sentence on count 5 should have been stayed pursuant to section 654

Chavez argues that the trial court violated the principles of section 654 by sentencing him for both robbery and false imprisonment because, he claims, each crime occurred during an indivisible course of conduct pursuant to a single objective.

A. *Relevant trial court proceedings*

Defendants were convicted on count 3 for the second robbery of Diaz and on count 5 for Diaz's false imprisonment by violence, with true findings on each count as to Chavez's personal firearm use and gang enhancements, and as to Garcia's gang enhancements. In their sentencing memorandum, the People argued that section 654 did not apply to any of the conviction counts. While the appellate record does not contain a sentencing memorandum filed by Chavez, Garcia filed one and argued that section 654 applied to counts 3 and 5.

In her closing argument to the jury, the prosecutor argued the following: Diaz was taken to the garage in Chavez's home to determine whether he was a police informant; he was stripped and examined for microphones. The robbery occurred in the garage at Chavez's home when Garcia took Diaz's personal property while Chavez held Diaz at gunpoint. Later, after Diaz was taken to the mechanic's shop, he asked for his property to be returned; he was given some items, but not his jewelry.

At Chavez's sentencing on January 5, 2017, the prosecutor argued that section 654 did not apply to counts 3 and 5 because the robbery was complete when Garcia took Diaz's belongings, but Diaz was held for hours afterwards, leading to the false imprisonment with violence count. She also argued that there were two acts of false imprisonment, first in Chavez's garage and then in the car after they left the garage.

Counsel for Chavez responded that there was only one act of false imprisonment—in the garage at Chavez's home—and any charge for the period after leaving Chavez's garage would have been for kidnapping since defendants moved Diaz a substantial distance. Counsel further asserted that the trial court could sentence Chavez separately on each of counts 3 and 5 because they were different acts. However, he argued that the

enhancements on those counts should "merge" and be sentenced concurrently or else section 654 would apply.

After entertaining oral argument, the trial court sentenced Chavez to five years for the robbery, 10 years for its firearm enhancement, and 10 years for its gang enhancement. For false imprisonment, Chavez received 16 months, plus 10 years for the firearm enhancement and three years for the gang enhancement. In so ruling, the trial court found that "all of that conduct actually is as [Chavez's attorney] stated from basically the same transaction," and, so, ordered the punishment on count 5 to run concurrently to that on count 3.

On March 6, 2017, the trial court sentenced Garcia to six years for his robbery conviction on count 3, plus 10 years for its gang enhancement. As to counts 3 and 5, Garcia's counsel argued that the fear used to take Diaz's property, and the fear used during the false imprisonment, were intended to terrorize Diaz so he would not inform on defendants. Given the common goal and objective, section 654 barred separate punishment on count 5. On count 5, the trial court sentenced Garcia to two years, plus three years for its gang enhancement. Agreeing with Garcia's counsel, the trial court determined that section 654 applied and stayed Garcia's sentence on count 5.

B. *Relevant law*

Section 654 prohibits punishment for multiple crimes arising from a single indivisible course of conduct. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1207–1208.) Section 654's applicability "turns on the defendant's objective in violating" multiple statutory provisions rather than temporal proximity. (*People v. Britt* (2004) 32 Cal.4th 944, 952.) If all the crimes for which the defendant was convicted were merely incidental to or the means of accomplishing or facilitating one objective, he may be punished only once. (*Ibid.*) However, multiple punishments

are proper if the defendant entertained multiple independent criminal objectives. (*People v. Harrison* (1989) 48 Cal.3d 321, 335.) Whether section 654 applies is a question of fact for the trial court, which is vested with broad latitude in making its determination; its findings, including implied findings, will not be *reversed* on appeal if there is any substantial evidence to support them. (*People v. Jackson* (2016) 1 Cal.5th 269, 354.)

Where section 654 applies, a trial court may not impose concurrent sentences. Instead, it should stay imposition of sentence on one of the counts. (*People v. Monarrez* (1998) 66 Cal.App.4th 710, 713.) If the base term of a sentence is stayed under section 654, the attendant enhancements must also be stayed. (*People v. Guilford* (1984) 151 Cal.App.3d 406, 411.)

C. *Analysis*

Here, the trial court seems to have credited Chavez's argument that the robbery and false imprisonment stemmed from the same conduct; Chavez was ordered to serve his sentences for counts 3 and 5 concurrently. The trial court went one step further when it sentenced Garcia two months later: It found that section 654 applied and stayed Garcia's sentence on count 5. In light of the trial court's comment at Chavez's sentencing hearing, and its act of staying Garcia's sentence on count 5, we conclude that section 654 applies to Chavez. He should not have been ordered to serve his sentence on count 5 concurrently with his sentence on count 3. Instead, his sentence on count 5 should have been stayed. (*People v. Jones* (2012) 54 Cal.4th 350, 353 ["although there appears to be little practical difference between imposing concurrent sentences, as the trial court did, and staying sentence on [the second conviction], as [Chavez] urges, the law is settled that the sentences must be stayed to the extent that section 654 prohibits multiple punishment"].)

IV. The firearm enhancement imposed under section 12022.53 on count 5 does not apply to false imprisonment

Chavez asserts that a 10-year sentence enhancement was erroneously imposed on count 5 under section 12022.53 because that section does not apply to that particular conviction. He asks that the matter be remanded for resentencing under section 12022.5, subdivision (a). The People agree.

We agree with the parties. Section 12022.53 does not apply to false imprisonment under section 236. (See § 12022.53, subd. (a).) Accordingly, the matter is remanded for resentencing on count 5's firearm enhancement pursuant to section 12022.5. (*People v. Fialho* (2014) 229 Cal.App.4th 1389, 1394–1397.)

V. The matter is remanded for reconsideration of Chavez's sentence as to the firearm enhancements imposed on counts 3 and 5 under Senate Bill Number 620

Chavez asserts that the matter should be remanded for resentencing on the firearm enhancement imposed on counts 3 and 5 under section 12022.5, subdivision (a), pursuant to Senate Bill Number 620 (2017-2018 Reg. Sess.). The People agree.

The trial court sentenced Chavez to the high term on count 3 of five years. Ten-year terms were imposed for each of the firearm and gang enhancements on count 3, for a total sentence on that count of 25 years. The trial court imposed the low term of 16 months on count 5, plus 10 years for the firearm enhancement and three years for the gang enhancement, and ordered that the term on count 5 run concurrently to that imposed on count 3.

At the time of Chavez's sentencing, trial courts had no authority to strike firearm enhancements proven under sections 12022.5 and 12022.53. But, Senate Bill Number 620, which became effective in January 2018, removed the prohibition; sections 12022.5 and 12022.53 now give trial courts the discretion

to strike an enhancement. We therefore remand the matter to the trial court to consider whether to strike the firearm enhancements pursuant to the discretion now conferred by Senate Bill Number 620.

VI. The trial court was not required to give a unanimity instruction as to either count 4 (criminal threats) or count 5 (false imprisonment)

Garcia argues that he was denied his right to a unanimous verdict under the California Constitution as to counts 4 and 5. Specifically, as to the criminal threats count, Garcia claims that the prosecutor identified in her argument to the jury two separate threats: one the day after the incident in Chavez's garage, and another on the day when Garcia and Perico took Diaz's cell phone at his house during the meeting with the Westside Longos. Regarding false imprisonment, Garcia again relies on the prosecutor's argument in which she stated that there were two separate acts of false imprisonment and the jury had to agree unanimously that defendants committed one of them; it was up to the jury to determine which one had been committed. Chavez joins in the argument as to count 5.

A. *Relevant trial court proceedings*

Count 4 charged defendants with committing the crime of making criminal threats on or between October 1, 2012, and October 30, 2012. Count 5 charged defendants with committing false imprisonment by violence during the same time period. After all of the trial evidence was presented, the prosecutor moved to extend the period to November 10, 2012, to conform to the evidence, in pertinent part, counts 3 through 6. Over defendants' objection, the trial court granted the People's motion.

1. Trial evidence

a. *Criminal threats*

The day after the incident in Chavez's garage, Garcia confronted Diaz at Diaz's home and demanded $15,000 to leave Diaz alone. Diaz understood Garcia wanted to kill him, but Garcia did not threaten him on that date. Around two days later, Garcia inquired about the $15,000 and told Diaz that if he was ordered to kill Diaz, he would do so. And, Garcia told Diaz that he had seven days to pay the money or Garcia would kill him.

In a subsequent meeting at Diaz's house involving members of the Westside Longos, Garcia tried to force Diaz to leave with defendants and Perico. Diaz believed that they would kill him. With the assistance of his wife, Diaz successfully resisted their efforts.

b. *False imprisonment*

Defendants held Diaz in Chavez's garage at gunpoint for over an hour. They then transported him at gunpoint to another location where, after weighing the matter, they released him.

2. Prosecutor's argument to the jury

a. *False imprisonment*

The prosecutor stated that the false imprisonment on count 5 "goes to the incident in the garage." She also noted that Diaz was taken in his car to the mechanic's shop and held there in his car. The prosecutor explained: "So we technically have two separate acts of false imprisonment here; we have one in the garage and we have the one in the vehicle. It's up to you to determine which one you believe it was. You need to all determine and agree on the same one but we actually have two acts here, both of which would qualify for that crime. So you need to unanimously agree on one of them to find the defendants—strike that. You need to unanimously agree that

each of these defendants committed at least one of these acts of false imprisonment by violence in order to find them guilty."

b. *Criminal threats*

The prosecutor explained that the criminal threats charge on count 4 related to conduct in the days following the false imprisonment in Chavez's garage, sometime in October or early November 2012. On that occasion, Garcia accused Diaz of sexually assaulting Ruby, demanded $15,000, and said he would kill Diaz if ordered to do so. The prosecutor then referenced the incident at Diaz's house, when Garcia and his colleagues tried to take Diaz's cell phone and Garcia reiterated that if he was told to kill Diaz, he would do so. The prosecutor also told the jury that the second threat was outside the time frame alleged by the People in count 5.

3. Jury instruction conference and jury instructions given

During the jury instruction conference, the parties did not discuss whether unanimity instructions should be given as to any of the counts.

The trial court instructed the jury, in relevant part, as follows: "You must decide all questions of fact in this case from the evidence received in this trial and not from any other source." The jury was also told to follow only the trial court's instructions in arriving at verdicts, and not anything said by the attorneys. The instructions were to be considered as a whole and in light of all of the other instructions. Statements by the attorneys were not evidence. With respect to discrepancies between a juror's recollection and his or her notes, or between or among jurors, the jury could request a readback of testimony. Evidence consisted of testimony and exhibits. Each count charged a distinct crime and must be decided separately. And, in order to reach a verdict, all

12 jurors must agree to the jury's decision and to any required findings.

B. *Relevant law and analysis*

A criminal defendant is entitled to a unanimous verdict in which all 12 jurors concur as a matter of due process under the California and federal Constitutions. (*People v. Russo* (2001) 25 Cal.4th 1124, 1132.) Thus, when the evidence shows more than one unlawful act that could support a single charged offense, the prosecution must either elect which act it is relying upon or the trial court must instruct the jurors sua sponte that they must unanimously agree which act constituted the crime. (*People v. Jennings* (2010) 50 Cal.4th 616, 679.) Accordingly, a unanimity instruction is appropriate when conviction on a single count could be based on multiple criminal events, but not where multiple theories or acts may form the basis of a guilty verdict on one discrete criminal event. (*People v. Russo*, *supra*, at pp. 1134–1135.)

A unanimity instruction is not required in all cases where the evidence establishes that more than one act could support conviction of a particular offense. "'"A unanimity instruction is required only if the jurors could otherwise disagree which act a defendant committed and yet convict him of the crime charged." [Citations.] "[W]here the acts were substantially identical in nature, so that any juror believing one act took place would inexorably believe all acts took place, the instruction is not necessary to the jury's understanding of the case.'" [Citations.]" (*People v. Champion* (1995) 9 Cal.4th 879, 932.)

In other words, a unanimity instruction is not required if the acts are so "closely connected in time as to form part of one transaction." (*People v. Jennings*, *supra*, 50 Cal.4th at p. 679.) The "'continuous conduct'" rule "applies when the defendant offers essentially the same defense to each of the acts, and there

is no reasonable basis for the jury to distinguish between them." (*People v. Stankewitz* (1990) 51 Cal.3d 72, 100.) Similarly, a unanimity instruction is not required ""where multiple theories or acts may form the basis of a guilty verdict on one discrete criminal event."' [Citation.]" (*People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1221.) When the evidence shows only a single crime, but leaves room for disagreement as to how that crime was committed or what the defendant's precise role was, the jury need not unanimously agree on the theory under which the defendant is guilty. (*People v. Jenkins* (2000) 22 Cal.4th 900, 1024–1026.)

In deciding whether the trial court should have given a unanimity instruction we conduct a de novo review. (*People v. Lueth* (2012) 206 Cal.App.4th 189, 195.)

1. Criminal threats

Despite the prosecutor's argument, there was no evidence showing that a second threat was made to Diaz. The jury was told that its decision had be unanimous on the evidence, that statements by the attorneys were not evidence, and that the jury must follow the law as instructed by the trial court. We presume the jurors understood and followed the trial court's instructions. (*People v. Hajek and Vo*, *supra*, 58 Cal.4th at p. 1229.)

To the extent defendants are relying upon the prosecutor's statement that Garcia restated the threat to kill Diaz if ordered to do so during the last meeting at Diaz's home, with the Westside Longo members, that argument fails for procedural reasons. Defendants should have objected at that time to the prosecutor's apparently erroneous comment. They did not do so, thereby forfeiting any objection on appeal. (*People v. Tully* (2012) 54 Cal.4th 952, 1010.)

In any event, a unanimity instruction was not required because all of the acts were so closely connected that they formed part of one transaction. The bottom line is that defendants

threatened Diaz after they were informed he was a police informant.

2. False imprisonment

Felony false imprisonment requires proof that defendants unlawfully violated the personal liberty of another through violence greater than necessary to simply restrain the victim. (*People v. Newman* (2015) 238 Cal.App.4th 103, 108.) Here, there was only one act of false imprisonment. It began when Diaz was held at gunpoint at Chavez's house, and it did not end until the parties were at the mechanic's shop at the end of the day's ordeal.

Certainly defendants unlawfully restrained Diaz in the garage by means of violence, as the prosecutor argued. But there was no interruption of the restraint of Diaz; his liberty was violated throughout the car ride to the mechanic's shop and until he was released. Thus, there was only one act of false imprisonment, and no unanimity instruction was required. All of the acts in question were part of one transaction, and there was no reasonable basis for the jury to distinguish between the different parts of the same criminal event.[8] (*People v. Hajek and Vo*, *supra*, 58 Cal.4th at p. 1221; *People v. Jennings*, *supra*, 50 Cal.4th at p. 679.)

As the People concede, the prosecutor did inform the jury that there were two acts of false imprisonment and the jury was required to unanimously agree that each defendant committed one of the two acts. But, as set forth above, defendants' trial counsel should have lodged an objection and/or sought an admonition at the time. By failing to do so, defendants have

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[8] It seems that if a separate charge had been brought for defendants' act of forcing Diaz to leave Chavez's garage and holding him at the mechanic's shop, it would have been for kidnapping, as Chavez's counsel recognized at oral argument below.

forfeited this objection on appeal. (*People v. Tully*, *supra*, 54 Cal.4th at p. 1010.)

C. *Any alleged error was harmless*

Even if the trial court had erred by failing to give a unanimity instruction, any alleged error was harmless as a matter of law. (*Chapman v. California*, *supra*, 386 U.S. at p. 24; *People v. Watson*, *supra*, 46 Cal.2d at p. 836.) Because the jury was presented with overwhelming evidence of defendants' guilt, the result would not have been any different. It follows that any alleged error was harmless.

VII. The trial court erroneously sentenced Garcia to six years in prison on count 3

Garcia argues that the trial court erroneously sentenced him to six years in state prison on count 3 (first degree robbery), as opposed to five years in state prison, which is the high term for second degree robbery. The People agree.

The information charged defendants with second degree robbery. During the jury instruction conference, counsel all agreed that robbery was charged as second degree robbery. During her opening statement, the prosecutor indicated that defendants were charged with "robbery, second degree robbery." When the trial court gave its instructions to the jury, it pointed out that there are two degrees of robbery. In this case, the trial court stated, "I instruct you that it is robbery of the second degree as a matter of law." And, the jury was given a verdict form for Chavez that did not provide for a finding as to the degree of robbery and only applied to second degree robbery.

In spite of the foregoing, the verdict form as to Garcia, asked the jury to find whether he was guilty of first or second degree robbery, and the jury found the robbery to be in the first degree. It does not appear that the jury was instructed on how to distinguish between first and second degree robbery. The

People's sentencing memorandum indicated that defendant was convicted of second degree robbery, and the People asked for a five-year term for that count.

At the sentencing hearing, the trial court stated, without objection, that Garcia had been convicted of first degree robbery. It sentenced him to the high term of six years.

In light of this procedural background, we agree with the parties that Garcia should have been sentenced to five years in state prison on count three for second degree robbery.

VIII. The trial court properly sentenced Garcia to two years after finding that two prior prison term allegations pursuant to section 667.5, subdivision (b), were true

Garcia asserts that the trial court improperly imposed one of two one-year sentencing enhancements under section 667.5, subdivision (b), because "[u]nder some circumstances, burglary is not today a felony," and the trial court was required to "compare elements" to determine whether Garcia's prior burglary conviction was for a felony.

A. *Relevant trial court proceedings*

The information alleged that Garcia had served three prior prison terms under section 667.5, subdivision (b): (1) In case number NA089719, for "PC459," on October 24, 2011; (2) In case number NA063229, for "PC496D(A)," on October 20, 2004; and (3) In case number NA084921, for "HS11378," on March 9, 2010. After the jury's verdicts were rendered, Garcia's attorney stated that Garcia would waive a jury with respect to the trial on the prior convictions. A court trial proceeded on the three prior prison term allegations.

1. Leo Ladan's (Ladan) testimony

Ladan, a paralegal with the prosecutor's office, testified that he was familiar with People's Exhibit Number 100, a certified section 969b prison packet from the California

Department of Corrections and Rehabilitation for Garcia, under his C.D.C. number, "V69797."

Page seven of People's Exhibit Number 100 was a certified abstract of judgment in *People v. Garcia*, Los Angeles County Superior Court case Number NA063229. That abstract showed that on October 20, 2004, Garcia pled guilty to unlawfully concealing and selling stolen property violation of section "496(d)(a)." That abstract of judgment also disclosed that Garcia was granted probation, which was revoked, and he was then sentenced to three years in state prison on February 4, 2005.

Page eight of People's Exhibit Number 100 was a certified abstract of judgment in *People v. Garcia*, in Los Angeles County Superior Court case Number NA084921, showing that he pled guilty on March 9, 2010, to possessing a controlled substance for sale in violation of Health and Safety Code section 11378, for which he was sentenced on the same day to one year four months in state prison.

People's Exhibit Number 101 was a certified court docket for Garcia in Los Angeles County Superior Court case number NA089719. Pages three and four of that exhibit disclosed that on October 24, 2011, Garcia pled nolo contendere to having violated section 459. As a result of that plea, probation was denied and Garcia was ordered to serve two years, the midterm as selected by the sentencing court, in county jail pursuant to section 1170, subdivisions (h)(1) and (h)(2).

After reviewing People's Exhibit Numbers 100 and 101, Ladan stated that Garcia did not remain free of both prison custody and the commission of an offense that resulted in a felony conviction for a period of five years or more after he first entered the prison system on February 23, 2005.

2. Lorraine Luna's (Luna) testimony

Luna, a fingerprint classifier for the Long Beach Police Department, rolled Garcia's fingerprints. She compared them to the fingerprints contained in Garcia's section 969b package and concluded that Garcia's fingerprints and the fingerprints in the section 969b package were the same. In Luna's experience, no two persons had the same fingerprints.

3. Argument and trial court ruling

Garcia objected to the admission of People's Exhibit Number 102, arguing, "Just ask the court for a finding the priors are not true."

The prosecutor argued that the People had proved that the convictions alleged with respect to the prior prison terms in question belonged to Garcia. The trial court agreed, finding that the "priors are in fact priors pursuant to 667.5(b) and do in fact belong to the defendant, Miguel Garcia." Thus, it found that the "allegations with respect to each of these priors" were true.

4. Sentencing

In their sentencing memorandum, the People asserted that the two surviving prior prison term enhancements that resulted in the imposition of one-year terms were for receiving stolen property (§ 496d, subd. (a)) and possession of a controlled substance for sale (Health & Saf. Code, § 11378).

The trial court sentenced Garcia "[p]ursuant to the two 667.5(b) priors, an additional two years."

B. *Analysis*

Preliminarily, Garcia's claim fails because he challenges the imposition of a one-year term under section 667.5, subdivision (b), resulting from a burglary conviction that the trial court found that he had suffered, but not one on which the trial court sentenced him. The trial court found true the three prior prison term allegations, but sentenced Garcia on only two of

them. It seems that the trial court sentenced Garcia as requested by the People in their sentencing memorandum, a one-year term for receiving stolen property and a one-year term for possession of a controlled substance for sale. And Garcia does not challenge those enhancements.

Regardless, on the merits, the trial court properly imposed two one-year enhancements because all of its true findings are supported by substantial evidence. (*People v. Tenner* (1993) 6 Cal.4th 559, 567; *People v. Buycks* (2018) 5 Cal.5th 857, 889.) The People presented certified official records regarding Garcia's prior prison terms. (*People v. Delgado* (2008) 43 Cal.4th 1059, 1066; *People v. Prieto* (2003) 30 Cal.4th 226, 258.) While Garcia complains that there was no proof that his prior burglary was a felony, the fact that he was sentenced to prison demonstrates that it was for a felony. (*People v. Buycks*, *supra*, at p. 889.)

People v. Gallardo (2017) 4 Cal.5th 120 (*Gallardo*) does not compel a different result. In that case, our Supreme Court found that the trial court erroneously relied upon a preliminary hearing transcript when it determined that a prior conviction for assault with a deadly weapon or by means likely to cause great bodily injury, to which the defendant pled guilty, was a serious felony. After all, nothing in the record of the assault conviction showed that the defendant had adopted the preliminary hearing transcript as the factual basis for her plea to that felony. (*Id*. at pp. 125–126, 136.) In contrast, here there is no evidence that the trial court relied upon any improper source of proof that Garcia's prior burglary conviction was a felony.

Moreover, as set forth above, Garcia was sentenced for burglary pursuant to section 1170, subdivisions (h)(1) and (h)(2). Those subdivisions apply, by their very terms, to felonies.

IX. The trial court properly imposed fees and assessments against Chavez

In a supplemental brief filed February 7, 2019, Chavez argues that the trial court erred in imposing two assessments and a restitution fine for a total of $7,710 without first determining that he is able to pay, in violation of his right to due process. In support, he relies upon *People v. Dueñas* (2019) 30 Cal.App.5th 1157, 1163–1173 (*Dueñas*).

We are not convinced. Based on the constitutional guarantees of due process and excessive fines, *Dueñas* held that trial courts may not impose three of the standard criminal assessments and fines—namely, the $30 court operations assessment (§ 1465.8), the $40 criminal conviction assessment (Gov. Code, § 70373), and the $300 restitution fine (§ 1202.4)—without first ascertaining the "defendant's present ability to pay." (*Dueñas*, *supra*, 30 Cal.App.5th at pp. 1164, 1172, fn. 10.) We need not decide whether we agree with *Dueñas* because Chavez is not entitled to a remand even if we accept *Dueñas*. That is because the record in this case, unlike the record in *Dueñas*, indicates that Chavez has the ability to pay the assessments and fines imposed in this case. A defendant's ability to pay includes "the defendant's ability to obtain prison wages and to earn money after his release from custody." (*People v. Hennessey* (1995) 37 Cal.App.4th 1830, 1837; *People v. Gentry* (1994) 28 Cal.App.4th 1374, 1376.) Prisoners earn wages ranging from $12 per month (for the lowest skilled jobs) to $72 per month (for the highest). (Cal. Dept. of Corrections & Rehabilitation, Operations Manual, §§ 51120.6, 51121.10 (2019).) At these rates, given Chavez's lengthy sentence, he will have enough to pay the assessments and fines.[9]

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[9] Even if Chavez does not voluntarily use his wages to pay the amounts due, the state may garnish between 20 and 50

Finally, we reject Chavez's argument that the $7,500 restitution fine must be stayed unless and until the People prove he has a present ability to pay. Chavez forfeited his challenge to the trial court's imposition of the $7,500 restitution fine. Even before *Dueñas*, a trial court could "consider[]" a defendant's "[i]nability to pay" whenever it "increase[ed] the amount of the restitution fine" in excess of the minimum of $300 applicable here. (§ 1202.4, subds. (b)(1), (c).) Chavez did not present any evidence regarding his ability to pay to the trial court at sentencing. As a result, the issue has been forfeited on appeal. (See, e.g., *People v. Gibson* (1994) 27 Cal.App.4th 1466, 1468–1469.)

Even if the issue were not forfeited, because Chavez "points to no evidence in the record supporting his inability to pay" (*People v. Gamache* (2010) 48 Cal.4th 347, 409), a remand would serve no purpose.

DISPOSITION

Regarding Chavez, the trial court is directed to modify the judgment so that the sentence for count 5 is imposed and stayed pursuant to section 654. The matter is also remanded for resentencing on counts 3 and 5 pursuant to section 12022.5, subdivision (a), and Senate Bill Number 620.

Regarding Garcia, the matter is remanded to the trial court with instructions to modify his sentence on count 3, reducing it from six years to five years in state prison.

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percent of those wages to pay the restitution fine. (§ 2085.5, subds. (a) & (c); *People v. Ellis* (2019) 31 Cal.App.5th 1090, 1094.)

The trial court shall amend the abstracts of judgment accordingly and forward copies thereof to the Department of Corrections and Rehabilitation. In all other respects, the judgments are affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
LUI

_____, J.
HOFFSTADT